STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 2002
v	No. 227350 Wayne Circuit Court
DORIAN G. JONES, Defendant-Appellant.	LC No. 99-003599

Before: Zahra, P.J., and Cavanagh and White, JJ.

WHITE, J. *(concurring in part and dissenting in part).*

I agree that the trial court did not abuse its discretion by permitting the prosecutor to strike the previously listed witness, and that no adverse inference instruction was required. I also agree that while the trial court erred in restricting defendant's ability to present the jury with evidence of decedent's violent character, *People v Harris*, 458 Mich 310, 316-317; 583 NW2d 680 (1998), defendant was able to present sufficient evidence on the issue to make it unlikely that the outcome would have been different had he been able to pursue the issue further. I also agree that defendant's in propria persona claims of error lack merit for the reasons stated by the majority.

I dissent, however, from the conclusion that the trial court properly denied defendant's request for a voluntary manslaughter instruction and that any error was harmless. Although there was evidence that defendant made a comment about "kicking [decedent's] ass," defendant denied making such a comment. There was also evidence that defendant went to his cousin's house to talk things over with decedent, who had allegedly been fighting over the telephone with defendant's girlfriend. There was also evidence that defendant had a gun with him because he generally carried it with him. Further, it was uncontested that decedent was in an agitated state, and that he approached defendant with a sledgehammer and argued with him. While defendant testified that he was about to leave when his cousin Cornell Jones called to him to "watch out," saying that decedent "had something," and that he turned around, saw decedent coming at his head with the sledge hammer, got scared and shot, there was also evidence that decedent came out from the back of the house in a very agitated condition, carrying the sledgehammer, that he dropped the sledgehammer and pushed defendant, and that an argument, with pushing, ensued, and that defendant then shot decedent. There was also evidence that defendant knew decedent to be aggressive, assaultive, and always to carry a gun.

Defendant requested the manslaughter instruction. The jury could reasonably have concluded, based on the evidence, that decedent actually dropped the sledgehammer earlier in the argument, so at the time defendant shot, he did not honestly and reasonably believe that his life was in danger, but that, nevertheless, defendant fired the gun in hot blood, under the influence of having been assaulted with a sledgehammer by a person who was in an agitated state, whom he knew to be violent, and whom he believed to be armed with a gun. By its verdict of second-degree, rather than first-degree, murder, the jury rejected the prosecutor's theory that defendant went to his cousin Pandora's house with the intent to kill decedent, and rejected the argument that the timing and placement of the gunshots established premeditation. Had the jury been given the option, it might have concluded that while defendant did not have an honest and reasonable belief that his life was in danger when he shot, his thinking was, nevertheless, disturbed by emotional excitement to the point that a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment.

/s/ Helene N. White